93-660

Supreme Court, U.S.
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NO. 93-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN L. HIRSH,
Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where petitioner's trial counsel did not object to the court's jury instruction explaining that the reasonable doubt standard does not require proof beyond all doubt and should not be applied to the exclusion of common sense, did the court below properly determine that petitioner received effective assistance of counsel?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commonwealth of Pennsylvania, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the order of the Superior Court of Pennsylvania affirming the trial court's judgment of sentence. The Superior Court's unpublished memorandum opinion is reproduced in the appendix to the petition for writ of certiorari at App. B1-B17. The trial court's opinion is

reproduced in that appendix at App. C1-C16.

STATEMENT OF THE CASE

Petitioner, Steven L. Hirsh, (hereinafter "Hirsh") was convicted of medicaid fraud for his part in a scheme to circumvent regulations of the Medical Assistance Program. Hirsh, a radiologist, agreed to bill the Pennsylvania Department of Public Welfare for x-rays taken by two chiropractors, David DeFries and Raymond Rogowski. (R. at 64, 132-133). Both chiropractors used x-rays in the diagnosis and treatment of their patients but state regulations did not authorize medicaid payments for x-rays taken by chiropractic providers. (R. at 56, 105, 110-112). However, because Hirsh was a physician, he could bill the Department for taking and reading x-rays. (R. at 57-61, 105-106). Consequently, to get around the regulations, the chiropractors forwarded x-rays of their medicaid patients to Hirsh, who then prepared a

report and billed the department as if he had taken the films at his own office. (R. at 57-58, 130-131).

Rejecting Hirsh's contention that he did not realize chiropractors could not bill for x-rays (R. at 225), the jury convicted him on all counts. Following denial of post-trial motions, judgment of sentence was entered February 12, 1992.

After filing his notice of appeal to the Superior Court of Pennsylvania, Hirsh retained his current counsel, Peter Goldberger, Esquire. Hirsh then argued that his trial counsel had been ineffective. Among other things, Hirsh claimed his trial counsel should have objected to the trial court's instructions regarding reasonable doubt. The trial court told the jury it must keep the standard in proper perspective and realize that it does not require proof beyond all doubt

and should not be applied to the exclusion of common sense. (R. at 334). In an opinion rendered February 12, 1993, the Superior Court affirmed the judgment of sentence, opining that, considered in its entirety, the charge was proper. In a per curiam order dated July 28, 1993, the Pennsylvania Supreme Court denied allowance of appeal.

In presenting his ineffectiveness claim to the Superior Court, Hirsh relied exclusively on Pennsylvania case law. Neither the federal constitution nor any federal precedent was mentioned. Further, in rejecting Hirsh's claim, the Superior Court did not specify whether it was deciding the issue as a question of state or federal law, but again, no federal precedents were cited. The standard applied by Pennsylvania courts to claims of ineffectiveness under Article I, Section 9 of the

Pennsylvania Constitution is equivalent to the standard required by the federal constitution. See Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) (Pennsylvania's standard for ineffective assistance of counsel claims under Article I, Section 9 of the Pennsylvania Constitution is the same as that announced by this Court in Strickland v. Washington, 466 U.S. 668 (1984)).

REASONS WHY THE PETITION SHOULD BE DENIED

Hirsh asks this Court to grant certiorari to review the trial court's jury instructions on reasonable doubt. In his petition, Hirsh has quoted only a small portion of the charge. However, in evaluating a jury instruction, this Court considers it in the context of the charge as a whole. Francis v. Franklin, 471 U.S. 307, 316 (1985).

In context, it is clear that the trial court's charge was not designed to disparage the fundamental rule of reasonable doubt, as Hirsh now claims. Rather, the trial court simply explained to the jury that a reasonable doubt is one based on reason and common sense rather than a desire to avoid an unpleasant duty. The trial court said:

> Now, I'm going to go into the very important principles that are applicable to every case.

Sometimes its said that--there are three principles, but they are so intertwined that we submit to a jury these principles together. They deal with the presumption of innocence, the burden of proof, and reasonable doubt.

This Defendant, as well as any Defendant, comes before a jury presumed to be innocent, and the burden is upon the Commonwealth to prove his guilt beyond a reasonable doubt.

A reasonable doubt is not a doubt that is fancied or conjured up in the minds of a jury to escape an unpleasant verdict. It is not--it must be an honest doubt arising out of the evidence itself; the kind of doubt that would restrain a reasonable man or woman from acting in a matter of importance to him or herself.

A reasonable doubt is not a doubt that it sought for, not a doubt that is conjured up from sympathy or prejudice or a desire to avoid the discharge of a disagreeable duty.

If all of the evidence leaves no such doubt in your mind as to the guilt of the Defendant, then the Commonwealth is justified in demanding a verdict of guilty as to that

charge about which you have no reasonable doubt of guilt, and I tell you there are four different charges.

You can find the Defendant guilty of one; you can find the Defendant guilty of all; you can find the Defendant guilty of one or two and innocent of the others; but in any event, you must be convinced beyond a reasonable doubt of those charges for which you find him guilty, if you do find him guilty.

On the other hand, if you are satisfied of the innocence of the Defendant, he would, of course, be entitled to an acquittal. If you have a reasonable doubt of his guilt, he would be entitled to an acquittal just as much as if you were satisfied of his innocence.

Now, because of the stress placed on reasonable doubt, I always add this because I think a jury should give some thought about this phrase in our system of jurisprudence.

You must keep this standard of reasonable doubt in proper perspective. It does not require that the Defendant be shown guilty beyond any and all doubt or any such similar standard.

> While you are sworn to protect the legal rights of the accused, you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

(R. at 332-334). Throughout its charge, the trial court repeatedly emphasized that the Commonwealth had the burden of proving Hirsh guilty beyond a reasonable doubt. (R. at 332-334, 338, 345-348).

Although Hirsh claims the Superior Court's affirmance conflicts with prior decisions of this Court, he has not cited a single case in which this Court, or any other court, has held it is improper to instruct a jury to use common sense in determining whether reasonable doubt exists. Significantly, many courts of appeal, and various state courts, have upheld jury instructions equating a reason-

able doubt with a common sense doubt. See e.g., United States v. Garza, 980 F.2d 546 (9th Cir. 1992) (Model Criminal Jury Instruction for the Ninth Circuit, § 3.03 that a reasonable doubt is based on a common sense and reason does not suggest a higher degree of doubt than is required); United States v. Torres, 901 F.2d 205 (2d Cir. 1990), cert. denied, Cruz v. United States, 498 U.S. 906 (1990) (court approved instruction that defined reasonable doubt as "a doubt that appeals to your reason, your judgment, your experience, and your common sense"); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988) (no reversible error was committed by trial court who equated reasonable doubt with a "fair doubt" and defined "fair doubt" as one based on reason and common sense); State of Oregon v. Williams, 313 Or. 19, 828 P.2d 1006 (1992), cert. denied, Wil-

liams v. Oregon, ___ U.S. ___, 113 S.Ct. 171, 121 L.Ed.2d 118 (1992) (explanation that reasonable doubt is based on reason and common sense was approved).

Further, Hirsh's assertion that the trial court's instruction "represents a gross deviation from any standard instruction" is patently incorrect. To the contrary, many standard instructions admonish jurors that a reasonable doubt is one based on common sense. See, e.g., United States v. Velasquez, 980 F.2d 1275 (9th Cir. 1992), cert. denied, 113 S.Ct. 2979, ___ U.S. ___, 125 L.Ed.2d 677 (1993) (1989 Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction 3.03); United States v. Harris, 974 F.2d 84 (8th Cir. 1992) (Eighth Circuit Model Instruction 3.11); United States v. Hunt, 794 F.2d 1095 (5th Cir. 1986) (pattern jury instructions for the Fifth Circuit); Unit-

ed States v. Gibson, 726 F.2d 869 (1st Cir. 1984) cert. denied, Gibson v. United States, 466 U.S. 960 (1984), (Pattern Jury Instruction 21 formulated by the Federal Judicial Center); State of Colorado v. Russo, 677 P.2d 386 (Colo. Ct. App. 1983) (J. Berman, dissenting), rev'd en banc, 713 P.2d 356 (Colo. 1986) (model instruction that reasonable doubt means a doubt based on reason and common sense); Wintjen v. State of Delaware, 398 A.2d 780 (Del. 1979) (pattern jury instruction used almost universally in the state equates reasonable doubt with common sense doubt); McDuffie v. State of Georgia, ___ Ga.App. ___, ___ S.E.2d ___, 93 Fulton County DR P3064 (filed August 6, 1993) (state's pattern jury instruction included definition of reasonable doubt as one based upon common sense and reason); Bell v. State of Indiana, 610 N.E.2d 229 (Ind. 1993) (Indi-

ana Pattern Jury Instructions (Criminal) 11.01); State of Missouri v. Antwine, 743 S.W.2d 51 (Mo. 1987), cert. denied, Antwine v. Missouri, 486 U.S. 1017 (1988) (Missouri's Standard Jury Instruction, MAI-CR2d 2.20); State of Nebraska v. Gatson, 244 Neb. 231, 505 N.W.2d 696 (1993) (state court approved use of Eighth Circuit Model Criminal Jury Instruction); State of North Carolina v. Portee, 28 N.C.App. 507, 221 S.E.2d 722 (1976), cert. denied, 289 N.C. 618, 223 S.E.2d 395 (1976) (North Carolina Pattern Jury Instruction--Crim. 104.25); State of Ohio v. Seneff, 70 Ohio App.2d 171, 435 N.E.2d 680, 24 Ohio Op.3d 215 (1980) (R.C.2901.05); Hankins v. State of Texas, 646 S.W.2d 191 (Tex. Crim. App. 1983) (op. on reh'g) (state court upheld use of instruction contained in 1 E. Devitt and C. Blackmar, Federal Jury Practice and Jury

Instruction, § 11.14, at 310-311 (3d Ed. 1977)). Hirsh should at least be aware that even Pennsylvania's suggested standard jury instructions explain the importance of using one's common sense in reaching a verdict. See Pa.S.S.J.I. (Crim.) §§ 7.03, 7.05.

There is no basis for Hirsh's contention that the trial court's instruction sent a clear signal to the jury that the judge "did not wish them to be overly concerned with the non-sensible technicality called 'reasonable doubt.'" (Petition at 21). Consequently, Hirsh has not presented this Court with any reason to suspect his trial counsel was ineffective, and the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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